No. 20114

In the United States Court of Appeals For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellee,

vs.

2.45 ACRES OF LAND, more or less, in Yakima County, Washington, and GEORGE L. BOCK, et al.,
Appellant.

No. 20114

REPLY BRIEF OF APPELLANT

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STATEMENT

Respondent sets forth on page 4 of its brief a map which is not an exhibit in the case and is indicated as not being drawn to scale; however, it is clear from this map that east of the freeway exit is not a portion of the U. S. Highway 82 project, which is the project that justified the jurisdiction of the Federal court. Secondary State Highway 11A is not a Federal project. State Highway 11A turns north at First Street in Yakima. An overpass over the railroad tracks recently constructed after much public controversy opening up easy access to the west side of the city of Yakima is not a part of the state highway system, but is simply a city of Yakima project, and by no stretch of the imagination constitutes a part of U. S. Highway 82. Limiting access from the subject property to Secondary State Highway

11A east of the freeway entrances and exits was purely a state item and in no wise involved Federal jurisdiction.

ARGUMENT

I

Increment Values

The respondent here contends that appellant's proposed instruction No. 6 does not properly state the law since the jury cannot take into consideration value created by the United States in constructing the project for which the land is taken. Here respondent completely misconceives the facts: The Lenox Avenue overpass is strictly a City of Yakima project. It is not a state highway project. Least of all is it a Federal project. It in no wise is a portion of U. S. Highway 82. It was, however, a project for which contracts had been let by the City of Yakima at the time of the trial. Certainly the jury was entitled to take into consideration the Lenox Avenue overpass in arriving at the value of this project. Counsel's argument is based entirely upon a misconception of the facts. Likewise, the state of Washington was building a bridge across the Columbia River upon which State Highway 11A crossed to reach the rich Columbia Basin and Palouse agricultural districts. Again, this was in no wise any portion of U. S. Highway 82, and I do not believe that counsel, Mr. Hull, would make any such contention to this court. Since the argument of respondent is based entirely

upon a misconception of the facts, the cases cited on page 16 of their brief are therefore simply not in point.

II

Substantive State Law

One of appellant's principal points is that the statute RCW 47.52.080 referred to in our opening brief on page 17 creates a vested property right in the property owner. To permit other land to be taken in state court abutting upon appellant's land and given values based upon the vested rights created by said statute, and then in this action to deprive the appellant of the same treatment, constitutes discrimination not contemplated by the Federal statutes, or Constitution.

The cases cited by the respondent, it is submitted, are not in point with respect to the specific issue here involved. In the case of *State of Washington v. United States*, 214 F. (2d) 33 (C.A. 9, 1954) cited on page 17 of respondent's brief, this court was confronted by a controversy between the United States and the State of Washington over the question of whether or not the state should be compensated for a road which was in the area condemned and taken by the government for the establishment of the Hanford works. In such a situation the measure of compensation is the cost of providing any necessary substitute. The court in that case set aside a $500,000.00 verdict upon the grounds that there was no sufficient evidence to justify the submission of the issue to a jury. On the question whether

state or Federal law applies, this court stated, page 39:

> "There is no real dispute about the applicable law concerning condemnation of roads and highways. Both parties cite and rely upon many of the same cases. The overwhelming weight of modern authority is to the effect that a municipality, a county, a state, or other public entity is entitled to compensation for the taking of a street, road or other public highway only to the extent that as a result of such taking it is compelled to construct a substitute highway."

It is obvious that the foregoing case has no relation whatsoever to the issue in the case at bar.

Respondent also cites the case of *United States v. Miller*, 317 U. S. 369 (1943), also at page 17 of respondent's brief. This case arose by reason of the taking of property in the state of California. It was contended by the property owner in that case that the California rule that increase in value of the subject property due to the construction contemplated by the taking was an element to be considered by the jury in determining fair market value. With that specific issue before it, the Supreme Court stated, page 379:

> "* * * They claim that the California rule is settled that fair market value at the date of taking is the standard of value without elimination of any increment attributable to the action of the taker. We need not determine what is the local law for the Federal statutes upon which reliance is placed require only that in condemnation proceedings a Federal Court shall adopt the forms and methods of procedure afforded by the law of the state in which the Court sits. They do not and could not affect questions of substantive right such as the measure of compensation grounded upon the Constitution of the United States."

A consideration of the exact issue before the Supreme Court and the language used by the Supreme Court dictates the conclusion, namely that the measure of compensation is to be determined by Federal law. But this does not say, and does not pretend to say, that property rights vested in the property owner by the statutes of the state may be taken without compensation. The case cited thus does not meet the issue posed by appellant's position. It is not the measure of compensation that is in issue, but whether a vested right can be taken without compensation.

Respondents next cite *United States v.* 93.790 *acres of land*, 360 U. S. 328 (1959). This case involves the issue whether or not the United States can revoke a lease and then commence condemnation proceedings. The argument of the property owner was that having commenced condemnation, the United States had made an election which forbade its revoking a lease, and therefore had to pay compensation for the leasehold interest. The court said, page 332:

> "Respondents argue, however, that the election of remedies is part of the law of Illinois and that Illinois law applies here * * * We have often held that where essential interests of the Federal government are concerned Federal law rules unless Congress chooses to make state laws applicable. It is apparent that no such choice has been made here."

We have here simply an interpretation of a Federal statute pertaining to a specific activity of the Federal government relating to the operation of airports and

leases thereon. It is obvious that this case has no bearing upon the issues submitted here.

Finally, the respondent cites the case of *United States v. Certain Parcels of Land, etc.*, 144 F. (2d) 626 (C.A. 3, 1944) also on page 17 of respondent's brief. In that case the issue was simply this: Under Pennsylvania law the price at which the subject property was sold at a prior time was inadmissible for the purpose of determining fair market value. Under Federal law where the sale is within a reasonable time such price is admissible for the purpose of determining fair market value. The court stated, page 628:

> "The question is presented, however, whether the Pennsylvania concept of value for purposes of eminent domain governs in a condemnation proceeding brought by the United States against land in Pennsylvania."

The issue is similar to the issue in the Miller case cited above, and the court cited the Miller case and held that the measure of compensation was determined by Federal law and not the law of the state—which in this case again was a court made rule of evidence as to what was material in an issue determining fair market value. Again we point out that this case does not meet the issue whether the government can take a right vested in the property owner by the laws of the state without compensation.

It is submitted that the cases cited by respondent upon this important issue are simply not in point.

III

Reply to Respondent's Argument That Appellant Is Not Entitled to Compensation Under the Guise of Severance Damage for Business Losses Because of the Change of the Access to the Highway

Commencing on page 19 of respondent's brief the argument is made that while appellant is entitled to compensation by reason of the taking of the access on Secondary State Highway 11-A that the jury was bound to accept the government's witnesses' views that an adequate substitute, although be it twice removed from Highway 11-A, was adequate. The appellant, of course, denied this and testified that the complete elimination of access directly from 11-A to his property had a direct and devastating effect upon the market value of his property. Thus it became an issue of fact to be determined by the jury as to the exact amount of this effect of the taking of such access. Respondent's only contention seems to be that the jury was bound to accept the government's testimony, which of course is not and could not be the law in view of the contrary evidence submitted by the respondent. Obviously then the case of *United States v. Grizzard*, 219 U. S. 180 (1911) and the other cases cited by appellant on pages 10 to 19 of appellant's brief are immediately in point. On page 25, respondent makes a statement of fact without qualification, which is illustrative of our argument here. Respondent states:

> "As in the case at bar, the change in access was not such as to cause injury to the remainder."

Such a statement is so completely contrary to the undisputed as well as the disputed evidence it is difficult, to put it mildly, to follow respondent's argument. It is respectfully submitted that respondent's argument here, based as it is upon such untenable assumptions of fact, is without merit.

CONCLUSION

It is respectfully submitted that respondent's brief does not meet or answer the points made by the appellant. The case should be remanded for a new trial in order that the appellant may be adequately compensated for the vested property rights taken and the damages sustained.

Respectfully submitted,
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Attorney for Appellant